FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MALIK SMITH, a/k/a Michael Marvin Montana, Tarid M. Smith, Tarik N. Smith, Tarik Smith, Tarik Marchand Smith, Tarik Malik Smith, Milik and Tarid Smith, Defendant - Appellant.	No. 05-50375 D.C. No. CR-03-00728-PA-01 MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted April 3, 2006
Pasadena, California

Before: D.W. NELSON and O'SCANNLAIN, Circuit Judges, and JONES[**], District Judge.

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] The Honorable Robert C. Jones, District Judge for the District of Nevada, sitting by designation.

Malik Smith appeals his conviction for assaulting a fellow inmate with a dangerous weapon in violation of 18 U.S.C. § 113(a)(3). He also appeals his 100-month sentence imposed consecutively to his undischarged term of imprisonment.

We have jurisdiction pursuant to 28 U.S.C. § 1291. The facts are known to the parties and will not be repeated here.

The jury instructions did not relieve the government of its burden to prove that the prison-made plastic knife employed in the offense was a dangerous weapon. *See United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999) ("In reviewing jury instructions, the relevant inquiry is whether the instructions *as a whole* are misleading or inadequate to guide the jury's deliberation.") (emphasis added).

The evidence in this case was sufficient to support the jury's finding that the knife was a dangerous weapon. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The government concedes, as it must, that the district court's imposition of a non-treatment drug testing supervised released condition that failed to state the maximum number of drug tests constituted an impermissible delegation of the court's statutory duty under 18 U.S.C. § 3583(d). *See United States v. Stephens*, 424 F.3d 876, 883-84 (9th Cir. 2005).

The government also conceded, at oral argument, that the district court erroneously consulted U.S.S.G. § 5G1.3(a) instead of U.S.S.G. § 5G1.3(c) when it denied Smith's request for a concurrent sentence. We conclude that this error was not harmless. Because the district court failed to consult § 5G1.3(c), we cannot confidently conclude that the district court considered the appropriate factors when deciding whether to impose a wholly concurrent, partially concurrent, or consecutive sentence.

Because we conclude that the district court's error in applying the wrong guideline was not harmless, we do not reach Smith's claim that his sentence is unreasonable. *See United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006)

Accordingly, we **AFFIRM** Smith's conviction but **REVERSE** and **REMAND** for re-sentencing as to the non-treatment drug testing supervised release condition and as to the determination to impose Smith's sentence concurrently, partially concurrently, or consecutively to his undischarged term of imprisonment.